

No. 89-1444

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,
v.

FIRST SECURITY BANK OF UTAH, N.A.,
as Personal Representative for the
Estate of Velma Rife Jones (deceased), *et al.,*
Respondents.

**On Petition for Writ of Certiorari
to the Supreme Court of Wyoming**

REPLY BRIEF FOR PETITIONER

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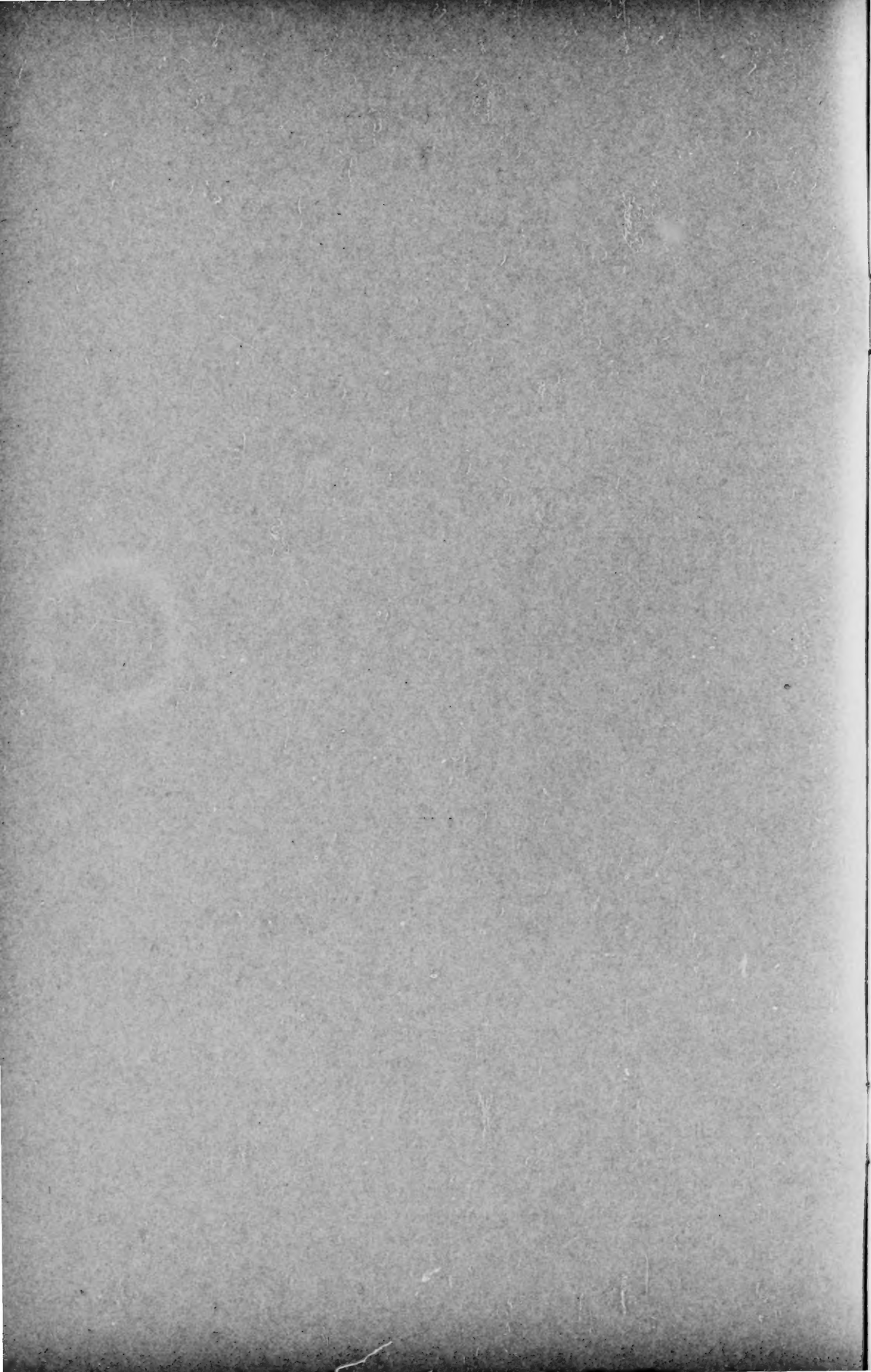


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**I. THE CONSTITUTIONAL QUESTION IS PROPERLY
PRESENTED.**

In their briefs in opposition, Respondents have made a bevy of arguments to try to persuade the Court that the substantial constitutional issue raised by Petitioner is not properly before the Court. None of these arguments has any force and the foolishness of some of them speaks volumes about Respondents' desperation to keep the court from addressing the merits of this case.

Respondents begin their assault on jurisdiction by arguing that Petitioner did not properly raise its due process challenge before the Wyoming courts. (Buyers Br. at 21-22; Banks Br. at 25-28.) As the attached Appendix E demonstrates, however, the due process is-

sue, and specifically the argument that the trustee was acting under a serious conflict of interest, was squarely presented to the Wyoming courts.¹ Indeed, two dissenting Wyoming Supreme Court justices indicated they would reverse the lower court's ruling precisely on the basis of Petitioner's due process argument. (Pet. App. A9.) That the majority of the Wyoming Supreme Court failed to address explicitly the due process challenge cannot immunize the case from this Court's review. See *Illinois v. Gates*, 462 U.S. 218, 218 n.1 (1988).

Respondents also claim that Petitioners were required under Wyoming law to notify the Attorney General of the pendency of the proceedings because the constitutionality of a Wyoming statute is being challenged. (Banks Br. at 13-15; Buyers Br. at 22-24). The problem with this claim is that no Wyoming statute was or is being challenged here. Petitioner's claim is that their constitutional rights were violated when a Wyoming court approved the sale of property without affording Petitioner notice and hearing. Since no Wyoming statute remotely required the probate court to proceed without notifying the trust's beneficiaries, there is no statute to challenge.

It is this very same misconception about some Wyoming statute being challenged that has led Respondents to claim that this Court's Rule 29.4(c) requires that the petition for certiorari contain a statement that a state statute is being challenged and that 28 U.S.C. § 2403(b) may be applicable. But, again, this is not a case where a statute is being challenged as unconstitutional. The petition for certiorari itself declares this to be the case, as jurisdiction is invoked on the ground that Petitioner

¹ The identical claim was advanced before the lower court as well. See R. 746, R. 756, R. 266 (arguing that trustee was preferring interests of the estate and life beneficiary over those of remaindermen); R. 723 and R. 146 (alleging intentional refusal to notify Petitioner).

claims a "title, right, privilege, or immunity . . . under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). See Petition for Certiorari 2 ("decisions rendered by the Supreme Court of Wyoming are repugnant to the Due Process Clause of the Fourteenth amendment to the United States Constitution").

II. THIS MATTER PRESENTS A SUBSTANTIAL QUESTION CONCERNING THE SCOPE OF DUE PROCESS GUARANTEES.

As with the jurisdictional issues, Respondents have attempted to divert the Court's attention from the issue presented. That issue so plainly demands a ruling favorable to Petitioner, that Respondents have chosen to attack the petition on grounds which are either difficult to entertain seriously or not supported by the facts of the case.

Respondents err in arguing that Petitioner has no property interest which is implicated by the sale of the ranch. (Banks Br. at 18, 20.) Yet, Petitioner's property rights in the trust and, in turn, in the estate are well-recognized under state law.² For example, no one would suggest that Wyoming could confiscate all charitable trust remainder interests without that constituting a taking of property. *Cf. Hodel v. Irving*, 481 U.S. 704, 717 (1987) (would-be heir of de minimis future interest has standing to challenge statute mandating escheat of said interest).

² Although Respondents focus heavily on their contention that Petitioner's interest is contingent (Banks Br. at 18; Buyers Br. at 16), that characterization is neither relevant nor accurate. Due process protections attach equally as well to contingent interests as to vested interests. Moreover, the Wyoming Supreme Court, in its opinion on rehearing implicitly recognized Petitioner's interest as vested. (Pet. App. B 3.) Similarly, the Attorney General of Wyoming, in an *amicus* brief filed in the Wyoming Supreme Court, asserted its position that Petitioner's interests are vested.

Respondents attempt to neutralize this common sense property interest by focusing on the role of the trustee, and arguing that the trustee's presence adequately protects the interests of the trust and the Petitioner. It is the obvious reality, however, that the trustee/co-personal representative cannot effectively represent the interests of both the estate and the trust in this matter that gives rise to Petitioner's due process claim.³ It is precisely due to the conflict arising out of First Security-Utah's dual capacity that the trust and Petitioner's interests were left unrepresented before the judicial proceeding.

That the trustee might have been empowered to sell trust assets without court approval is irrelevant to Petitioner's claim. Had the ranch been sold by the trustee few of the circumstances now giving rise to the violation of Petitioner's due process rights would have come to pass. Since such a sale would have been undertaken without court approval, petitioner's potential cause of action could not have been diminished.⁴

Furthermore, and more significantly, no conflict of interest giving rise to the obligation to notify Petitioner would have arisen. First Security-Utah, as trustee, simply would not have been in the position to sell the ranch to pay its own fees as co-personal representative.⁵

³ It is hardly out of character that in denying the existence of a conflict, Respondent Banks do not even mention the fact that First Security-Utah served as both trustee and co-personal representative. (Banks Br. at 25-28.)

⁴ As there would be no court approval, and, thus, no state action, constitutional due process standards would not be applicable. It is clear, however, contrary to the suggestion of Respondent Buyers, that the judicial proceedings in this case, like all judicial proceedings, particularly probate proceedings, constitute state action. *See, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

⁵ Respondent Buyers dramatically note that Petitioner has not raised Wyoming Statute Section 4-8-105(b), which requires a trustee to seek court approval of a sale where the trustee finds

Petitioner's property interest in its potential cause of action against the trustee has been significantly and directly affected by the judicial proceeding being challenged here. To be sure, Respondents now conveniently insist that the order approving the sale does not have any effect on Petitioner's rights against the trustee. Yet Respondent Banks have previously asserted before the Wyoming Supreme Court that Wyoming Statute § 2-7-620 effectively bars Petitioner from seeking redress for injuries suffered as a result of the sale. (R. 195-227.) The statute itself bars collateral attacks of judicially approved sales of property by personal representatives.

Respondents' suggestion that Petitioner's due process rights have been satisfied by compliance with the notice requirements of the Wyoming statutory scheme is similarly defective. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). Certainly, Petitioner's right to notice is not satisfied or suspended merely because the statutory scheme does not require notice to Petitioner. Whether the statutory scheme is reasonable is wholly irrelevant to the due process analysis. Where, as here, due process requires actual notice to an interested party, due process is not satisfied by compliance with "reasonable" statutory notice requirements, where such requirements do not include notice to such party.

In the typical instance, a trustee acts for the benefit of the trust beneficiary and is directly accountable to the

itself in a conflict of interest. (Buyers Br. at 18 n.10.) Petitioner acknowledges that it has not done so because the statute is inapplicable where, as here, the sale involved is undertaken by the personal representative. Indeed, if First Security-Utah, as trustee, were to find itself in a conflict of interest, under Wyoming law, First Security-Utah could not sell the ranch without court approval. The statutory scheme provides this safeguard precisely because a conflicted trustee cannot be relied upon to represent the interests of the trust adequately.

beneficiary for all its actions. Typically, also, during the time frame under which the trustee is acting on behalf of and for the beneficiaries, the actions taken by the trustee are known to the beneficiaries and are approved by the beneficiaries, thereby protecting the beneficiaries from unknown wrongful acts of the trustee. None of these safeguards were in place here.

Respondents' further attempt to direct the attention of the Court away from Petitioner's due process claim by arguing the reasonableness of the sale of the ranch. The reasonableness of the sale is, of course, irrelevant to whether Petitioner has been afforded the process which it is due. Nevertheless, it is enlightening to note the frequency with which Respondents assert the failure of Petitioner to cite to evidence supporting its case in the record. It is precisely because Petitioner was denied the opportunity to participate in the proceedings, and later denied the opportunity to conduct discovery that such evidence is scarce (though by no means absent) in the record. Of course, had Petitioner been afforded the opportunity to so participate it would not now be complaining of this violation of its due process rights.

Finally, Respondents' suggestion that Petitioner's is a unique situation is wholly inaccurate. In fact, over 20 charitable organizations thought the issue to be important enough to file supporting *amicus* briefs with the Court. Further, those *amicus* briefs estimate that charities have known charitable remainder interests worth over \$5 billion. Charitable remainder trusts constitute one of the major sources of funds for such charities and are intended by the federal government to provide a key mechanism for funding charitable institutions. Moreover, trustees frequently also serve as personal representatives.

The issue presented is plainly substantial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX



APPENDIX E

The quotations presented below reflect instances in which Petitioner asserted its conflict of interest/due process claim before the Wyoming courts:

One-in-the-same corporate entity giving notice from itself, in one fiduciary capacity, to itself, in another fiduciary capacity, can hardly be equated with the constitutional minimum requirement of actual notice to a real party in interest whose property interest may be affected adversely. Instead of making the reasonably diligent efforts to uncover Appellant's identity and its intention to claim its beneficial interest in the real property in kind, as required by the *Tulsa* case, *supra*, the Personal Representatives in this probate almost appear to have been diligently attempting to cover-up Appellant's identity and to ignore Appellant's interest in the real property that is subject to this probate administration.

(Appellant's [Petitioner's] Brief in Support of Petition for Reargument and Rehearing, filed April 4, 1989 in Wyoming Supreme Court, at 15.)

The material risk of loss to the charitable remainder beneficiaries that could result from fiduciary mismanagement is exacerbated by the fact that one and the same corporate fiduciary is designated as the Personal Representative of the Last Will and Testament of the late Velma Rife Jones and as the Trustee of the testamentary unitrust contained as a part of the provisions of that Will. Under the initial decision of the majority of this Court, an unscrupulous fiduciary serving in such a joint capacity could administer certain aspects of the financial affairs furtively and to the substantial and material detri-

ment of the charitable remainder beneficiaries, and perhaps never be called to account.

(Appellant's [Petitioner's] Supplemental Brief upon Rehearing filed May 17, 1989 in Wyoming Supreme Court, at 7.)

Chief Justice Cardine, correctly noted in his dissent of the initial Wyoming Supreme Court decision that the Shriners Hospital advanced two arguments, the second argument was that "because of its property interest in the estate, notice is required by the Due Process Clause of the United States Constitution.

(Pet. App. A 9.)

